
THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT: NEW OPTIONS IN REGULATORY RELIEF

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On March 29, 1996, President William Jefferson Clinton signed into law the Small Business Regulatory Enforcement Fairness Act ("SBREFA").² The Act made some of the most dramatic changes in the agency decisionmaking process since the enactment of the Administrative Procedure Act fifty years earlier.

This article will begin with a review SBREFA's predecessor, and the statute which it amends, the Regulatory Flexibility Act ("RFA").³ The article will then examine the requirements needed to satisfactorily implement the RFA. The need to modify the RFA will be discussed in light of its implementation by one agency, the Federal Communications Commission ("Commission" or "FCC"). The article will conclude with a discussion of SBREFA and the opportunities that it presents in order to achieve regulatory relief at the Commission.

I. THE 1970S AND THE NEED FOR REGULATORY RELIEF

The Occupational Safety and Health Act, the

Clean Air Act, the Federal Water Pollution Control Act Amendments, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Rodenticide and Fungicide Act Amendments, the Clean Water Act, the Clean Air Act Amendments, the Natural Gas Policy Act, the Public Utility Regulatory Policy Act, the Marine Mammal Protection Act, the Magnuson Fishery Conservation and Management Act, the National Forest Management Act, the Forest and Rangeland Renewable Resources Planning Act, the Coastal Zone Management Act, the Safe Drinking Water Act, the Endangered Species Act, the Animal Welfare Act, the Noise Control Act, the Employment Security Act, the Consumer Product Safety Act, the Surface Mining Control and Reclamation Act, the Federal Mine and Safety and Health Act, the Federal Railroad Safety Act, the Fair Credit Reporting Act, and the Fair Debt Collection Practices Act, along with others too numerous to cite, are all laws which have one thing in common, they were all enacted during the 1970s.⁴ If Franklin Delano Roosevelt and the programs he created, primarily through

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² Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (to be codified at 5 U.S.C. § 611(a)(3)(A)).

³ Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1154 (as amended by SBREFA at 5 U.S.C. § 611(a)(3)(A)).

⁴ Occupational Safety and Healthy Act (OSHA) of 1970, 29 U.S.C. § 651 (1994); Clean Air Act (CAA), 42 U.S.C. § 7401 (1994); Federal Water Pollution Control Act (FWCPA), 33 U.S.C. § 1251 (1994); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 (1994); Resource Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. § 6901 (1994); Federal Insecticide, Rodenticide and Fungicide Act Amendments, 7 U.S.C. § 136 (1994); Clean Water Act of 1977, 33 U.S.C. § 1294 (1994); Clean Air Act Amendments of

1977, 42 U.S.C. § 7419 (1994); Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 (1994); Public Utility Regulatory Policies Act (PURPA) of 1978, 16 U.S.C. § 2601 (1994); Marine Mammal Protection Act (MMPA) of 1972, 16 U.S.C. § 1361 (1994); Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 (1994); National Forest Management Act (NFMA) of 1976, 16 U.S.C. § 4721 (1994); Forest and Rangeland Renewable Resources Planning Act (FRRRPA) of 1974, 16 U.S.C. § 1600 (1994); Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 (1994); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f (1994); Endangered Species Act (ESA) of 1973, 16 U.S.C. § 1531 (1994); Animal Welfare Act of 1970, 7 U.S.C. § 2155 (1994); Noise Control Act (NCA) of 1972, 42 U.S.C. § 49012 (1994); Employment Security Amendments of 1970, 42 U.S.C. § 504 (1994); Consumer Product Safety Act (CPSA), 15 U.S.C. § 2051 (1994); Surface Mining Control and Reclamation Act (SMCRA) of 1977, 30 U.S.C. § 1201 (1994); Federal Mine and Safety and Health Act of 1977, 30 U.S.C. § 801 (1994); Federal Railroad Safety Act (FRSA) of 1970, 49 U.S.C. § 20101 (1994); Fair

the New Deal, provided the seeds to modern administrative federal government, the 1970s allowed such seeds to blossom into a full garden.

By the end of that decade, businesses were groaning under the weight of federal regulation. For example, the Federal Register had grown from a non-weighty publication for the obscurants of the federal government to a 42,000-page⁵ blueprint for regulating many aspects of modern American life. This crush of federal dictates was particularly troubling to small businesses who found it increasingly difficult to meet the burgeoning requirements, while at the same time trying to successfully maintain their businesses.⁶

In a series of hearings in the late 1970s, Congress began focusing on the ever-growing burden federal regulation imposed upon small businesses.⁷ These hearings uncovered two major points: (1) small businesses were underrepresented in federal regulatory proceedings; and (2) federal agency efforts to impose a "one-size-fits-all" body of regulation imposed disproportionate burdens on those small businesses.⁸

The findings of Congress were supported and reinforced during the 1980 White House Conference on Small Business.⁹ Small-business persons from around the United States gathered to discuss issues of importance, how these issues affected their interests, and to recommend changes in federal policy. Overwhelming numbers of these attendees expressed dismay and anger at the growing burdens imposed by federal regula-

tions and mounting paperwork requirements.¹⁰

Congress, spurred on by cries from small businesses, responded with the enactment of the RFA and the Paperwork Reduction Act ("PRA").¹¹ Congress had expected that these two pieces of legislation would stem the growth of regulatory burdens on the economy, in general, and on small businesses, in particular.¹² However, these Congressional hopes were subsequently dashed by clever bureaucrats.

II. THE THEORY OF THE REGULATORY FLEXIBILITY ACT

The RFA is one component of a significantly broader mechanism of control over the agency decisionmaking process, the Administrative Procedure Act ("APA").¹³ The APA prevents an agency from taking actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹⁴ In the context of executive administrative and agency rulemaking, this APA standard inherently requires the promulgation of rational rules.¹⁵ The promulgation of rational rules requires the agency itself to ascertain the problem,¹⁶ design potential solutions,¹⁷ seek public comment on those solutions,¹⁸ and craft a final rule that addresses all relevant statutory criteria.¹⁹ The APA then provides the procedure by which the agency develops its regulations.

Presidents Carter, Reagan, and Clinton all insti-

Credit Reporting Act (FCRA), 15 U.S.C. § 1681 (1994); Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 (1994).

⁵ 126 CONG. REC. S10,939 (daily ed. May 12, 1980) (statement of Sen. Culver).

⁶ *Id.* at S21,451-52 (daily ed. Aug. 6, 1980) (statement of Sen. Culver).

⁷ An excellent summary of these legislative hearings can be found in Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213 (1982). For the sake of brevity, I will not repeat that in-depth treatment in this article. *Cf.* W. Shakespeare, *Hamlet*, Act II, Scene ii (Tucker Brooke & Jack Randall Crawford eds., Yale Univ. Press 1947) ("... since brevity is the soul of wit").

⁸ S. Rep. No. 96-878, at 1 (1980), *reprinted in* 1981 U.S.C.C.A.N. 2788.

⁹ White House Conference On Small Business, 96th Cong., Delegate Recommendations and Resolutions From White House Conference on Small Business (Comm. Print 1980).

¹⁰ *See supra* note 6.

¹¹ Paperwork Reduction Act, 44 U.S.C. §§ 2904, 2905, 3501-3507 (1995). The Paperwork Reduction Act empowered the Office of Management and Budget to control the

flow reporting and recordkeeping requirements initiated by federal agency activity. An analysis of the Paperwork Reduction Act is beyond the scope of this article. *See* William F. Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 HARV. J. ON LEGIS. 1 (1987).

¹² Verkuil, *supra* note 7, at 257.

¹³ 5 U.S.C. § 500 (1994).

¹⁴ *See id.* at § 706(2)(A).

¹⁵ *See, e.g.*, *Motor Vehicle Mfr. Ass'n of America v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974).

¹⁶ *See, e.g.*, *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 (1986); *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982).

¹⁷ *See, e.g.*, *Mount Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1232 (9th Cir. 1993); *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

¹⁸ *See, e.g.*, *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995); *Natural Resources Defense Council v. EPA*, 824 F.2d 1258, 1285 (1st Cir. 1987); *Chocolate Mfr. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985).

¹⁹ *See, e.g.*, *American Textile Mfr. Inst. v. Donovan*, 452 U.S. 490, 539-41 (1981); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 418-19 (1971).

tuted Executive Orders requiring certain regulations to go through the analytical filter of a cost-benefit analysis.²⁰ However, that filter does not apply to all agencies, in particular the Federal Communications Commission,²¹ which is subject to revision and elimination should a President so desire. However, it does not necessarily force the agency to consider the impact of its regulations on small business.²²

The RFA represents another analytical mechanism that agencies use in an effort to reach a rational rulemaking decision.²³ Rather than focus on the cost and benefits of a particular regulation, the RFA requires the agency to undertake a cost-effective analysis, in order to discover the least-costly method of attaining the statutory objective of the rulemaking agency.²⁴ Instead of analyzing the impacts of its regulatory actions on all relevant sectors of the economy, the RFA narrows the scope of the particular review to an examination of the rule's impact on small businesses in particular.²⁵

The RFA's special focus on small businesses is logical for three primary reasons. First, in most industries, the vast majority of businesses are considered small.²⁶ Second, small businesses are disproportionately disadvantaged by federal regulation compared to their larger business counterparts.²⁷ Finally, federal agencies often do not recognize the impact that such regulations

will typically have on small businesses.²⁸

If the cost of compliance with a federal regulation is fixed, then the smaller firm will suffer a more severe impact since it has a smaller output over which to recover the costs.²⁹ Assume that the Federal Communications Commission imposes a requirement that all interexchange carriers are to report their costs to the Commission which as a result will raise the cost of providing service by \$1,000. An interexchange carrier with 1,000 customers can recoup that cost by charging each customer \$1.00. An interexchange carrier with 500 customers would have to charge \$2.00 to recover the cost of the reporting requirement. Therefore, the larger interexchange carrier will be able to undersell the smaller carrier and still make a profit. This example highlights the existence of scale economies in compliance with federal regulations.³⁰

The RFA was enacted to obtain federal agency recognition of effects and take steps to reduce them.³¹ The chief goal of the RFA is not solely to reduce the burdens on small entities.³² Rather, the proper utilization of the RFA will result in rules that help achieve the statutory mandate of the agency at a lower cost.³³ Moreover, to the extent that regulations are promulgated, which take account of the business size and the ability of small businesses to comply, federal agencies are likely to obtain greater overall compliance.³⁴ The

²⁰ See generally, Exec. Order No. 12,190, 45 Fed. Reg. 7773 (1980); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

²¹ Since the Commission is an independent regulatory body, the President is unable to exercise control over its activities. See *In re Humphrey's Executor*, 295 U.S. 62 (1935). Therefore, the Executive Orders authorizing the Office of Management and Budget to undertake reviews of agency regulations would be an unconstitutional intrusion into the affairs of this and other independent agencies. In fact, Congressional concern over the constitutional considerations is such that the Paperwork Reduction Act, which requires the Office of Management and Budget to approve every record-keeping and reporting requirement, permits independent agencies, such as the Federal Communications Commission to override an Office of Management and Budget disapproval of an information collection. Paperwork Reduction Act, 44 U.S.C. §§ 2904(8), 3502(10), 3507(c) (1994). No executive branch agency has such authority. See *id.* § 3507.

²² See generally, Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1154 (as amended by SBREFA at 5 U.S.C. § 611(a)(3)(A)).

²³ *Id.*

²⁴ Verkuil, *supra* note 7, at 219.

²⁵ *Id.* at 219-20.

²⁶ There are only a few industries in which there are no small businesses. For example, automobile manufacturing

and interstate natural gas pipelines are among the select few industries without any small businesses. Although the vast majority of businesses in most industries are small, that does not translate into small business domination of a particular market. For example, in the provision of local exchange telephone service, there are approximately 1400 companies of which eight control over 95% of the local telephone lines in the country. Similarly, there are approximately 500 companies that provide interexchange telephone service; yet four corporations control approximately 90% of the market. *Id.*

²⁷ *Id.* at 221-22.

²⁸ *Id.* at 221-23.

²⁹ *Id.*

³⁰ See Jack Faucett Associates, *Economies of Scale in Regulatory Compliance: Evidence of the Differential Impacts of Regulation by Firm Size passim* (1984) (prepared under contract for the United States Small Business Administration's Office of Advocacy).

³¹ S. Rep. 87, 96th Cong., 2d Sess. 3, 10 (1980) reprinted in 1980 U.S.C.C.A.N. 2788, 2790, 2797. S.Rep.No. 96-878, *supra* note 8, at 2788, 2790, 2797.

³² *Id.*

³³ *Id.*

³⁴ A small business that is unable to comply with a regulation because of the cost, refuse to comply, unless the probability of enforcement is sufficiently high. However, if the regulation takes account of entity size and properly

end result will place the success of small businesses in the hands of consumers in the marketplace, and not federal bureaucrats in Washington, D.C.

III. COMPLIANCE WITH THE RFA

A. Certification

Since SBREFA only makes adjustments to the requirements for complying with the RFA, it is necessary to examine in-depth the requirement for agency compliance with regulatory flexibility provisions prior to the RFA's amendment by SBREFA. Under the RFA, a federal agency may certify that a rule will not have a significant economic impact upon a substantial number of small businesses, thereby avoiding the necessity to perform a regulatory flexibility analysis.³⁵ The certification must be published in the Federal Register and accompanied by "a succinct statement explaining the reasons for the certification"³⁶ The certification contemplates that the agency has performed some threshold economic analysis to examine the number of small businesses and the impact of the proposed or final regulation on them.³⁷

There are no established standards for deter-

tailors the related cost, there is a substantially greater probability of self-compliance by small businesses without the threat of increased federal enforcement. See generally, Verkuil, *supra* note 7.

³⁵ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (to be codified at 5 U.S.C. § 611(a)(3)(A)). See *infra* notes 44-47 and accompanying text.

³⁶ See *infra* notes 44-47 and accompanying text.

³⁷ *Id.*

³⁸ The Regulatory Flexibility Act does not define small business. Rather it cross-references the definition found in the Small Business Act. 15 U.S.C. §§ 631-56 (1994). The Small Business Act defines a small business as one that is independently owned and operated and not dominant in its field. *Id.* at § 632(a). Pursuant to the authority of the Small Business Act, the Administrator has promulgated size standards. Size Standards Used to Define Small Business Concerns, 13 C.F.R. § 121.201 (1995). However, those size standards were designed solely to implement the Small Business Act. Cf. 15 U.S.C. § 632(a)(2)(C) (1994) (requiring federal agencies to obtain approval of Administrator if adopting a different size standard for regulatory purposes). They were not intended to be utilized in analyzing the regulatory impact of a proposed or final rule on small businesses. As a result, the RFA authorizes a federal agency to adopt a definition of 'small business' other than the one set forth in the Small Business Administration's regulations for purposes of complying with the Regulatory Flexibility Act. 5 U.S.C.

mining exactly what a substantial number of small businesses or a significant economic impact specifically are.³⁸ Furthermore, neither the Office of Management and Budget nor the Office of Advocacy of the United States Small Business Administration³⁹ has made any effort to issue such standards.⁴⁰ Given the excessive breadth of federal agency regulation, such a task might prove fruitless in any event.

The absence of these brightline standards should inherently force the agency to consider a wide variety of factors before deciding whether to certify a particular rule. To perform a proper certification, the agency should first determine the total number of businesses in the industry, the total number of those businesses which are within the definition of "small", the number of businesses subject to regulation,⁴¹ the cost of implementing the regulation and the impact that the cost will have on profits of small businesses. From this information, the agency should be able to determine whether the proposed or final rule should be certified.

B. Initial Regulatory Flexibility Analysis

If an agency's preliminary threshold analysis

§ 601(3) (1994). An agency wishing to take this alternative route must first confer with the Office of Advocacy. *Id.*

³⁹ The Office of Advocacy is charged with monitoring agency compliance with the Regulatory Flexibility Act. 5 U.S.C. § 612 (1994).

⁴⁰ Some agencies have developed their own internal standards for determining when an impact will be significant. See, e.g., National Marine Fisheries Service, Regulatory Impact Review Regulatory Flexibility Analysis for Amendment 7 Northeast Multispecies Fishery, § 8.3.5 (1996), summarized in 61 Fed. Reg. 8540, 8544-45 (1995). Microeconomic Applications, Inc., Cost Effective Regulation by EPA and Small Business Impact *passim* (1992) (SBA Contract No. 4116-OA-89). However, these standards have not been adopted as regulations and, as a result, agencies are not required to follow the standards. Cf. *Adams Telecomm., Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994); *Rodway v. USDA*, 514 F.2d 809, 814 (D.C. Cir. 1975) (holding that agency must follow its own regulations in promulgating rules).

⁴¹ The total number of businesses subject to regulation and the total number of businesses are not necessarily the same. For example, the Federal Communications Commission only requires certain local exchange carriers to provide Automated Reporting Management Information Systems (ARMIS). See Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, *Report and Order*, 2 FCC Rcd. 5770, 5772 (1987). The vast majority of such carriers are not subject to this requirement. *Id.*

reveals that the proposed rule will have a significant economic impact upon a substantial number of small entities, the agency is required to perform an initial regulatory flexibility analysis.⁴² Such an analysis must contain the following: (1) the reasons the agency is taking the regulatory action; (2) a succinct statement of the objectives and legal basis for the rule; (3) a description and estimate of the small businesses affected by the rule; (4) a description of the reporting, record-keeping, and other compliance requirements with special attention to the affected small entities; and (5) any duplicative federal regulations.⁴³ An agency will generally provide this information in order to comply with other requirements.⁴⁴ For example, the recordkeeping and reporting requirements will be detailed in order to satisfy the requirements of the PRA.⁴⁵

More importantly, the initial regulatory flexibility analysis must describe "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule"⁴⁶ Such alternatives may include, but are not limited to: (1) differing compliance and reporting requirements for small businesses; (2) "clarification, consolidation, or simplification of compliance and reporting requirements"; (3) the use of performance rather than design standards; and (4) exemptions.⁴⁷

While these alternatives might be examined pursuant to the requirements of the APA,⁴⁸ compliance with the RFA is designed to ensure that an agency examines these alternative regulatory regimes in the context of easing burdens on small business.⁴⁹

The initial regulatory flexibility analysis must be published in the Federal Register.⁵⁰ If it is sufficiently long, a summary of the analysis may be published.⁵¹ Publication of the analysis has three objectives. First, the regulated community is apprised of the potential impact of a proposed rule.⁵² Second, it provides small businesses with the needed information to permit comment on the proposed rule, the rule's impact on them, and other potential alternatives that the agency may have overlooked.⁵³ Finally, publication of the analysis is an element of the outreach requirement in the RFA.⁵⁴

C. The Final Regulatory Flexibility Analysis

Once an agency completes an initial regulatory flexibility analysis, it is then required to develop a final regulatory flexibility analysis.⁵⁵ The final regulatory flexibility analysis requires the agency to provide a summary of the reasons for the rule, a discussion of the issues raised by the "comments in response to the initial regulatory flexibility analysis," and whether any changes have been

⁴² Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1154 (as amended by SBREFA at 5 U.S.C. § 603 (1994)). The initial regulatory flexibility analysis is likely to subsume any preliminary economic analysis done as the proposed rule was being developed. An agency is unlikely to publish that analysis.

⁴³ *Id.* at § 603(b).

⁴⁴ *Id.* at § 605 (1994).

⁴⁵ 44 U.S.C. § 3507 (1994).

⁴⁶ Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1154 (as amended by SBREFA at 5 U.S.C. § 603(c) (1994)).

⁴⁷ *Id.*

⁴⁸ See *supra* text accompanying note 16.

⁴⁹ Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1154 (as amended by SBREFA at 5 U.S.C. § 603(a)(1) (1994)).

⁵⁰ *Id.* at § 603(a).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1154 (as amended by SBREFA at 5 U.S.C. § 603(c) (1994)); see also *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987).

⁵⁴ An agency is required to ensure that small businesses

are given the opportunity to participate in the rulemaking process. 5 U.S.C. § 609 (1994). To facilitate this participation, the Regulatory Flexibility Act requires the agency to go beyond simple publication of the notice in the FEDERAL REGISTER; the agency is affirmatively required to perform outreach to the small business community including the direct notification of small businesses and publication of the proposed rule in publications generally read by the affected small business community. *Id.*

Since the enactment of the Regulatory Flexibility Act, only two agencies have made any semblance of concerted and consistent efforts to obtain the input of small businesses — the National Marine Fisheries Service and the Agricultural Marketing Service. These efforts result less from interest in complying with the Regulatory Flexibility Act than with the statutory structures of the Magnuson Fishery Conservation and Management Act and the Agricultural Marketing Agreement Act. Both statutory schemes require substantial input by business-dominated advisory committee in industries generally consisting of small businesses. See Barry A. Pineles, *Marketing Orders and the Administrative Process: Fitting Round Fruit into Square Baskets*, 5 SAN JOAQUIN AG. L. REV. 89, 116 (1995). In fact, the only area in which the Agricultural Marketing Service complies with the Regulatory Flexibility Act is the outreach to small business. *Id.* at 99-104.

⁵⁵ 5 U.S.C. § 604(a) (1994).

made in the proposed rule as a result of the initial comments.⁵⁶ These issues also should be required in an agency's 'statement of basis and purpose' in order to comply with the APA.⁵⁷ However, the final regulatory flexibility analysis must also describe each of the significant alternatives to the final rule designed to minimize the impact of the rule on small businesses, followed by a statement of why each was rejected.⁵⁸

As the Court noted in *Citizens to Preserve Overton Park*,⁵⁹ an agency's decision must be based on the relevant factors mandated by Congress. The RFA makes the impact on small business one of the relevant factors to be considered in agency rulemaking.

IV. FEDERAL COMMUNICATIONS COMMISSION IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT

Though in effect for approximately fifteen years, the Commission's implementation of the RFA has been problematic. A number of issues have arisen in the FCC's implementation of the RFA including: (1) the length and lack of definiteness in their notices of proposed rulemaking; (2) the requirement that comments on the RFA be submitted under separate cover;⁶⁰ (3) the Commission's continued determination to regulate due to concerns regarding the dominance of local exchange carriers and cable operators in their fields;⁶¹ and (4) the failure of the agency to tier its regulations to different size businesses.⁶² The implementation problems have prevented

the Commission from utilizing the RFA to minimize burdens on small telecommunications companies.

A. Length of Rulemaking Issuances

As already discussed, the RFA requires affirmative action by federal agencies to seek the comments and participation of small businesses in the rulemaking process. The Commission's efforts in this regard are hampered by the breadth of its rulemaking notices and subsequent summarization in the Federal Register.

The Commission's notices of proposed rulemaking, particularly for complex issues such as implementation of the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992,⁶³ implementation of the local competition provisions of the Telecommunications Act of 1996,⁶⁴ or the adoption of incentive-based regulation for local exchange carriers,⁶⁵ are quite lengthy. Unless small business executives have a severe case of insomnia or the financial resources to hire special regulatory counsel, it is unlikely that they will peruse these announcements. Therefore, it is unlikely that individual small businesses will participate in these important proceedings.

The Commission compounds this error by generally summarizing the notices in the Federal Register.⁶⁶ Important issues may frequently be buried in footnotes or material left out of the synopsis.⁶⁷ Moreover, subscription to the official compilation of FCC issuances, the FCC Record, may not arrive

⁵⁶ *Id.*

⁵⁷ See, e.g., *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1469 (7th Cir. 1985); *South Carolina ex. rel. Tindal v. Block*, 717 F.2d 874, 886 (4th Cir. 1983); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

⁵⁸ Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1154 (as amended by SBREFA at 5 U.S.C. § 604(a)(3) (1994)).

⁵⁹ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 418-19 (1971).

⁶⁰ *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992-Rate Regulation, Uniform Rate Setting Methodology, Notice of Proposed Rulemaking*, 11 FCC Rcd. 3791, 3801 (1996).

⁶¹ *In re Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd. 2878 (1989).

⁶² *In re Implementation of Sections of Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking*, 8 FCC Rcd. 510, 515-16 (1993).

⁶³ *Id.*

⁶⁴ *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking* (released Apr. 19, 1996), summarized in 61 Fed. Reg. 18,311 (1996). The notice of proposed rulemaking was 96 pages with 294 paragraphs and 386 footnotes.

⁶⁵ *In re Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd. 2873 (1989). To fully grasp the issues involved in the second further notice of proposed rulemaking (which is not easily identified in the table of contents) requires a potential small-business commenter to wade through nearly 500 pages of obtuse and arcane material.

⁶⁶ This author knows of only one Commission issuance of a lengthy, detailed rulemaking that was published in full in the Federal Register. *In re Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd. 5532 (1994), reprinted in full, 59 Fed. Reg. 37,566 (1994).

⁶⁷ See *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993); *RCA Global Comm., Inc. v. FCC*, 758 F.2d 722, 730 (D.C. Cir. 1985).

in time for the small business to file comments.⁶⁸ Therefore, small businesses interested in participating in Commission proceedings must either subscribe to a commercial service that delivers the issuances or gain access to the Commission's site on the World Wide Web.⁶⁹ However, these options may be too expensive or unavailable to many small businesses.

Given the length of the Commission's issuances and the difficulty in obtaining them on a timely basis, the Commission forecloses substantial small-business participation. Furthermore, the Commission, except in the rarest of circumstances, has made no effort to conduct the type of outreach mandated in the RFA.⁷⁰

B. Requirement for Separate Filing of Comments

The Commission compounds the problem of lengthy issuances by requiring small-business commenters to file comments on the Commission's regulatory flexibility analyses under separate cover.⁷¹ Small businesses then must prepare two sets of comments; one on the proposed rule and one on the regulatory flexibility analysis.⁷² The ostensible reason for requiring two sets of comments, both of which generally address the same issues, is to facilitate the Commission's "preparation of a compulsory summary of such comments [on the initial analysis] and our responses to

them, as required by the RFA."⁷³ Thus, for its own convenience in implementing a statute designed to reduce small-business burdens, the Commission imposes greater burdens on them. As a result, these burdens reduce the probability that the Commission will receive substantial amounts of separate comments on its regulatory flexibility analysis and potential alternatives that would assist small businesses.

C. Dominance of Local Exchange Carriers and Cable Television Operators

The Commission does not perform a regulatory flexibility analysis when issuing rules concerning local exchange carriers.⁷⁴ The Commission has determined that the definition of "small business" in the Small Business Act excludes businesses dominant in their fields.⁷⁵ The Commission reasoned that even very small local exchange carriers "enjoy a dominant monopoly position in their local service area."⁷⁶ The Commission continues to consider this an appropriate determination.⁷⁷

Nor has the Commission performed a regulatory flexibility analysis in implementing rate regulation for cable operators pursuant to the Cable Television Consumer Protection and Competition Act of 1992. The Commission found that "[c]able systems subject to rate regulation are by definition dominant in their field of operation"⁷⁸

Both of these Commission decisions fail to rec-

⁶⁸ For example, the notice of proposed rulemaking on implementing the local competition provisions of the Telecommunications Act of 1996 were not published in the FCC Record by the time the Commission already had issued the Report and Order. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, released Aug. 8, 1996, 61 Fed. 45476 (Aug. 29, 1996).

⁶⁹ Federal Communications Commission, <<http://www.fcc.gov/>>.

⁷⁰ A small business advisory committee was heavily involved in the development of the Commission's spectrum allocation for Personal Communication Services. *In re Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, Appendix C—Report of the Small Business Advisory Committee, 8 FCC Rcd. 7700, 7820 (1993).

⁷¹ See e.g., *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992—Rate Regulation, Uniform Rate Setting Methodology, Notice of Proposed Rulemaking*, 11 FCC Rcd 3791, 3801 (1996) (released Nov. 29, 1995) (rulemaking published in FCC Record for March 18-29, 1996, nearly one month after the comment period closed); *In re Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave*

Relocation, Notice of Proposed Rulemaking, 11 FCC Rcd 1923, 1969 (1996) (released Oct. 13, 1995); *In re Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, Notice of Proposed Rulemaking*, 8 FCC Rcd 2502, 2508 (1993).

⁷² See 11 FCC Rcd. 3791, 3801 (1996); see also 8 FCC Rcd. 2502, 2508 (1993).

⁷³ *In re Implementation of the Local Competition Provisions in the Telecommunications Act, FCC 96-325, First Report and Order* 634 (Released Aug. 8, 1996), summarized in 61 Fed. Reg. 45,476 (1996) (Federal Register summary does not contain material quoted in text).

⁷⁴ See *infra* note 84, at 631.

⁷⁵ *In re MTS and WATS Market Structure, Third Report and Order*, 93 F.C.C.2d 241, 338 (1983).

⁷⁶ *Id.*

⁷⁷ *In re Implementation of the Local Competition Provisions in the Telecommunications Act, FCC 96-325, First Report and Order* 632 (released Aug. 8, 1996) (reiterating Commission finding that local exchange carriers not subject to RFA), summarized in 61 Fed. Reg. 45,476 (1996).

⁷⁸ *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7418 (1995).

ognize important elements of both the Small Business Act and the RFA. First, the regulations implementing the Small Business Act determine dominance by reference to the national economy, not local or regional economics.⁷⁹ Second, the RFA provides that the Commission can adopt a different definition of small business for purposes of complying with the RFA and analyzing the impact of its rules on small cable operators and local exchange carriers.⁸⁰ Even if the Commission is following the letter of the RFA (and it does not appear to be), it certainly is not following the spirit of the RFA. More significantly, the failure to recognize the difference in size among individually regulated entities prevents the Commission from, as a matter of course, identifying alternatives that will reduce burdens on small local exchange carriers and cable operators.

D. The Failure to Tier Regulations

The Commission's decision that the RFA does not apply to small local exchange carriers and cable operators is symptomatic of a larger problem, the Commission's failure to 'tier' its regulations.⁸¹ One of the most significant options available in the RFA is the requirement for an agency

to examine tiering as an alternative regulatory strategy.⁸² While the Commission occasionally tiers its regulations,⁸³ more often than not, the Commission applies a "one-size-fits-all" standard to its regulations.⁸⁴ It is this one-size-fits-all approach to regulation that the authors of the RFA were trying to correct.⁸⁵ While the Commission's failure to perform regulatory flexibility analyses for small local exchange carriers and cable operators does not prevent the Commission from uncovering less burdensome alternatives,⁸⁶ the one-size-fits-all attitude continues to predominate. In fact, it often required extraordinary efforts by both small-business organizations and the Office of Advocacy of the United States Small Business Administration before the Commission recognized the need for tiering of its regulations. Regulatory relief for small local exchange carriers arose after a petition for rulemaking was filed with the Commission.⁸⁷ Rate relief for small cable operators only came about after significant intervention by the Office of Advocacy.⁸⁸ Similar efforts by the Office of Advocacy and the Administrator of the United States Small Business Administration convinced the Commission that its size standards for auctions in personal communi-

⁷⁹ 13 C.F.R. § 121.102(b) (1996) (looks at market share to determine whether company can exercise controlling influence on national basis). The Commission appears to rely on *California Dredging Co. v. Sanders*, 657 F. Supp. 38, 41 (D.D.C. 1986), for the proposition that dominance in a geographic region can preclude a business from being considered small. The Commission's reliance creates a number of problems. First, by interpreting the Small Business Act to include a regional measure of dominance, the Commission is making a size determination, i.e., that these businesses are not small. The Small Business Act does not give the Commission that authority. Secondly, *California Dredging* was based on the failure of the Small Business Administration to articulate a reason why it only considered dominance on a national basis. *Id.* Subsequent to the *California Dredging* decision, the Small Business Administration promulgated a regulation in which it held that it would examine dominance on a national basis. See 13 C.F.R. § 121.401 (1995) (*superseded by* 13 C.F.R. § 121.102(b)). Therefore, the basis for the court's holding in *California Dredging* is no longer valid. As a result, it appears that the Commission's basis for utilizing regional dominance as an appropriate interpretation of the Small Business Act is invalid.

⁸⁰ Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1154 (as amended by SBREFA at 5 U.S.C. § 601(3) (1994)).

⁸¹ Tiering is defined as the method by which government agencies adjust regulations to meet the needs of various interested parties, in the case of the subject matter of this article, small businesses. Verkuil, *supra* note 7, at 226.

⁸² Senate Report, 96-878, at 10-11 (1980).

⁸³ For example, the Commission only required that Tier 1 local exchange carriers adopt price cap regulations. *In re Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd. 2873, 3176 (1989).

⁸⁴ For example, the Commission's rules on tariff filings apply with equal force to the largest and smallest inter-exchange carriers. See 47 C.F.R. §§ 61.20-22 (1995). These rules have been subsequently modified and the Commission no longer requires tariff filings by inter-exchange carriers.

⁸⁵ Senate Report, 96-878, at 3 (1980).

⁸⁶ *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd. 7393, 7424-25 (1995); *In re Regulation of Small Telephone Companies, Report and Order*, 2 FCC Rcd. 3811, 3815 (1987).

⁸⁷ *In re Regulation of Small Telephone Companies, Notice of Proposed Rulemaking*, 1 FCC Rcd. 1206, 1206 (1986). The Commission granted some relief, namely a choice for small carriers to participate in cost and revenue sharing pools, but refused to reconsider its determination of the inapplicability of the RFA to regulation of small local exchange carriers. *In re Regulation of Small Telephone Companies, Report and Order*, 2 FCC Rcd. 3811, 3815 (1987).

⁸⁸ *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7400 (1995).

cation services needed substantial revision.⁸⁹ Such efforts by small-business groups and their representatives should not be necessary if the Commission fully complied with both the letter and spirit of the RFA.

E. Conclusion

The Commission's compliance is, by no means, the worst in the federal bureaucracy. In fact, the Commission, despite its failures, often makes efforts at reducing the impact of its regulations on small entities.⁹⁰ However, the goal of the RFA is to inculcate, at the earliest stages of rulemaking, the notion that regulatory flexibility is needed for small businesses.⁹¹ The Commission, like most federal agencies during the past fifteen years, has failed to achieve that goal.

IV. THE NEED FOR JUDICIAL REVIEW OF AGENCY COMPLIANCE WITH THE REGULATORY FLEXIBILITY ACT

When an agency fails to comply with a statute, an aggrieved party can seek redress in the courts.⁹² However, the access to courts is blocked if a statute specifically precludes judicial review, which the RFA specifically did with respect to judicial review of agency compliance.⁹³

Regulatory flexibility analyses were only part of the record upon review.⁹⁴ The court examined

the analysis and, if it is so flawed that it undercut the rationality of the rule, then the rule is invalid, not due to the agency's failure to comply with the RFA, but because the rule violated the rulemaking standards set out in the APA.⁹⁵

Even more troubling is the fact that courts have held that the decision whether to perform a certification is not judicially reviewable and is left to the sole discretion of the agency.⁹⁶ In fact, the express language of the RFA does not even require that a certification be made a part of the record on review.⁹⁷ As a result, an agency not interested in complying with the RFA simply needed to certify the rule under § 605(b) and could escape judicial scrutiny altogether.

Recognition that the RFA was not achieving its goals because agencies could avoid compliance with the RFA led to a concerted effort to amend the RFA. Of primary importance was the need for judicial review and the commensurate threat of litigation that would force agencies to more fully comply with the RFA.⁹⁸ The absence of meaningful judicial review created an atmosphere in which compliance rested upon the agency's commitment to utilization of the RFA. As established above, the Commission has not been fully committed to this goal. Judicial review appeared to be the optimal vehicle for converting RFA compliance from an afterthought to a first consideration in agency rulemaking.⁹⁹

Federal agencies, not surprisingly, were strongly

⁸⁹ See, *In re* Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd. 5532, 5607-08 (1994).

⁹⁰ See *e.g.*, *In re* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992-Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd. 7393 (1995); *In re* Regulation of Small Telephone Companies, *Report and Order*, 2 FCC Rcd. 3811, 3815 (1987); 47 C.F.R. § 61.38 (1995).

⁹¹ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (to be codified at 5 U.S.C. § 601 note (1994)).

⁹² *Id.* at § 702 (1994); see also *Heckler v. Chaney*, 470 U.S. 821, 828-29 (1985).

⁹³ *Id.* at § 611(a) (1994).

⁹⁴ *Id.* at § 611(b) (1994).

⁹⁵ *Michigan v. Thomas*, 805 F.2d 176, 188 (6th Cir. 1986); *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 539 (D.C. Cir. 1983); *Stinson Canning Co. v. Mosbacher*, 731 F. Supp. 32, 37 (D.Me. 1990).

⁹⁶ *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986) (district court determination on Regulatory Flexibility Act was not addressed on appeal); see *Colorado State Banking Bd. v. RTC*, 926 F.2d 931, 948 (10th Cir.

1991) (in *dicta* court held that certification was proper after determining certifications not reviewable).

⁹⁷ The Regulatory Flexibility Act provides that any "regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action . . ." Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1154 (as amended by SBREFA at 5 U.S.C. § 611(b) (1994)). Conspicuously absent from this is any certification prepared pursuant to § 605(b).

⁹⁸ See *e.g.*, 142 CONG. REC. E573 (daily ed. Mar. 28, 1996) (statement of Rep. Hyde); REGULATORY FLEXIBILITY AMENDMENTS ACT OF 1993: HEARING BEFORE THE SUBCOMM. ON ADMIN. LAW AND GOV'T. RELATIONS OF THE COMM. ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 103d Cong. 33-34, 1st Sess., [hereinafter *Hearings*] (statement of Doris Freedman, Acting Chief Counsel for Advocacy) at 16.

⁹⁹ The proponents of judicial review believed that the threat of litigation would force agencies to fully comply with the RFA in the same manner that litigation over federal agency preparation of environmental impact statements forced agencies to fully consider, at the earliest stages, environmental considerations. See, *e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1983); *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

opposed to such changes to the RFA.¹⁰⁰ The agencies believed that judicial review of the RFA would be akin to the albatross that hung around the neck of the Ancient Mariner.¹⁰¹ Opposition from agencies rested on the notion of a potential litigation explosion.¹⁰² However, a more fundamental concern was that an agency would not be able to adopt a specific regulatory action.¹⁰³ This is, in actuality, an irrational fear since the RFA, like the National Environmental Policy Act, is a procedural statute and enables the agency to select any course of action it desires after performing the requisite analysis of small business impacts.¹⁰⁴

While agency opposition did slow progress toward amendment of the RFA, it did not completely stop the momentum. In 1996, the 104th Congress, controlled by the Republican Party, decided to act. Their actions were spurred in part by the collective call of small businesses that gathered at the 1996 White House Conference on Small Business, which called for judicial review of the RFA.¹⁰⁵

V. THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

On March 29, 1996, President Clinton signed into law the Small Business Regulatory Enforcement Fairness Act (SBREFA). SBREFA contains a number of provisions designed to enable small businesses to seek regulatory relief. The centerpiece of SBREFA is the changes it made to the RFA. Note, however, that other important efforts at regulatory relief are included as well.

A. Amendments to the RFA

SBREFA makes changes to the requirements concerning the preparation of final regulatory flexibility analyses. In particular, analyses now must contain an estimate of the number of small businesses that will be subject to regulation or the reasons why the agency could not make that estimate;¹⁰⁶ the factual, legal, and policy reasons why the agency could not take steps to minimize burdens on small business;¹⁰⁷ and the type of professional skills needed to comply with any record-keeping or reporting requirements.¹⁰⁸ While the details are more specific, the fundamental requirements of the final analysis remain essentially the same — describe the potential alternatives that reduce burdens on small business and explain why those alternatives were not selected.

More fundamental changes were made in the statement supporting an agency's certification. Such certifications often were simple boilerplate statements.¹⁰⁹ With the promulgation of SBREFA, now the agency's statement need not be succinct; the agency does, however, need to provide the factual basis for the certification.¹¹⁰

If a small business disagrees with either the final analysis or certification, it can challenge the agency's compliance in court.¹¹¹ A small business aggrieved by an agency action taken pursuant to the RFA can challenge the agency's compliance.¹¹² Specifically, an aggrieved small entity can challenge the adequacy of the agency's final regulatory flexibility analysis or certification, the agency's failure to review its regulations on a periodic basis,¹¹³ and in the context of a challenge to

¹⁰⁰ *Hearings*, *supra* note 102, at 37.

¹⁰¹ *Id.* Cf. Samuel Taylor Coleridge, *THE RIME OF THE ANCIENT MARINER*, reprinted in *The Complete Poetical Works of Samuel Taylor Coleridge*, at 186 (Ernest Hartley Coleridge ed., 1st ed. 1912) (1798) (Ancient Mariner kills albatross and must sail oceans without any fresh water to drink).

¹⁰² *Hearings*, *supra* note 102.

¹⁰³ See Pineles, *supra* note 58, at 104.

¹⁰⁴ Cf. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 350, 352 (1989); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980).

¹⁰⁵ 142 CONG. REC. E571 (daily ed. Apr. 19, 1996) (statement of Rep. Hyde).

¹⁰⁶ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, ' 242, 110 Stat. 857 (to be codified at 5 U.S.C. § 604(a)(4)).

¹⁰⁷ *Id.* at § 604(a)(5) (to be codified at 5 U.S.C. § 604(a)(5)).

¹⁰⁸ *Id.* at § 604(a)(4) (to be codified at 5 U.S.C. § 604(a)(4)).

¹⁰⁹ For example, the Commission's certification statements simply reiterated its determination that local exchange carriers and cable operators were dominant. See *supra* text accompanying notes 80-84; see also Pineles, *supra* note 58, at 113.

¹¹⁰ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, ' 243, 110 Stat. 857 (to be codified at 5 U.S.C. § 605(b)).

¹¹¹ *Id.* at § 242 (to be codified at 5 U.S.C. § 611(a)).

¹¹² *Id.*

¹¹³ The RFA requires that an agency review every rule promulgated after the enactment of the RFA within ten years of its promulgation to determine whether the regulation imposes undue burdens on small business. 5 U.S.C. § 610 (1994). Only the Federal Trade Commission actually has a plan to perform these periodic reviews.

a specific analysis or certification, the agency's efforts at outreach required by § 609.¹¹⁴ Permissible lawsuits must be brought within one year, or if an agency rule must be challenged under a shorter statute of limitations, then the shorter period applies.¹¹⁵ Finally, the court, if it so finds, can delay the enforcement of the rule against small businesses until the agency has complied with the RFA.¹¹⁶

B. Enforcement Problems

Congress recognized that agency rulemakings are not the only troublesome aspect of federal regulatory oversight.¹¹⁷ Numerous small businesses are caught in the 'web' of federal agency enforcement without having knowledge of the rules and regulations. Therefore, Congress sought, to the extent possible, to ameliorate some of the problems faced by small businesses in enforcement proceedings.¹¹⁸

First, many small businesses initially recognize that they have committed a violation when an inspector or auditor walks through their door. To avoid this potential problem and obtain compliance rather than the resultant fines, Congress directed each federal agency to prepare plain-English compliance guides for rules or groups of similar rules in which the agency prepared a final regulatory flexibility analysis, i.e. finding that the rule would have a significant economic impact upon a substantial number of small entities.¹¹⁹ Although the compliance guide itself will not be subject to judicial review, the content of the guide may be considered in determining the reasonableness of the fine or violation.¹²⁰

Also, agencies are directed to respond to requests for informal guidance from an agency (ir-

respective of whether a compliance guide was required to be prepared), and that guidance can also be considered when determining the reasonableness of the particular penalty or violation.¹²¹

Second, SBREFA created an Ombudsman within the Small Business Administration to ensure that small businesses subject to enforcement have an avenue in which they can complain about the conduct of agency personnel during an enforcement action or proceeding on a confidential basis.¹²² The basis and intent for this provision is not to derail enforcement actions *per se*, but rather it is designed to ensure that agency enforcement personnel are acting in a professional manner and in accordance with the latest guidance issued from the agency.¹²³ The Ombudsman is to ensure that such complaints are transmitted to the appropriate personnel in a federal agency or, if need be, the Inspector General.¹²⁴ To ensure that the Ombudsman is being heard in the appropriate channels of the given agency, the Ombudsman is required to provide an annual evaluation to Congress and the agencies on the enforcement activities of the agency.¹²⁵

To assist the Ombudsman, SBREFA creates five regional boards made up of small-business owners.¹²⁶ They are to collect information and hold hearings, if necessary, on the enforcement activities of federal agencies.¹²⁷ Most importantly, they are to report annually to the Ombudsman on any "excessive enforcement actions" of federal agencies.¹²⁸

Finally, Congress determined that the concept of flexibility also embodied in the RFA should also apply to enforcement proceedings.¹²⁹ Congress directed every federal agency regulating small business (which includes the Federal Com-

¹¹⁴ Agencies also are required to utilize computer networks to make known notices of proposed rulemaking. SBREFA, § 244(a)(2) (to be codified at 5 U.S.C. § 609(a)(2)). In addition, there are special outreach provisions and requirements for rulemakings conducted by the Environmental Protection Agency and Occupational Safety and Health Administration. *Id.* at § 609(b). While a full discussion of the special outreach provisions is beyond the scope of this article, SBREFA requires those two agencies to convene a panel, along with the Office of Advocacy of the United States Small Business Administration, obtain comment on rules in which the agency has prepared an initial regulatory flexibility analysis, and prepare a report on the impact to be included in the record. *Id.*

¹¹⁵ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, ' 242, 110 Stat. 857 (to be codi-

fied at 5 U.S.C. § 611(a)(3)(A)).

¹¹⁶ *Id.* at § 604(a)(4)(B).

¹¹⁷ *Id.* at § 202.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at § 212(a) (to be codified at 5 U.S.C. § 601).

¹²⁰ *Id.* at § 212(c).

¹²¹ *Id.* at § 213(a).

¹²² *Id.* at § 222 (to be codified at 15 U.S.C. § 657(b)(2)).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at § 657(b)(2)(C) (1996).

¹²⁶ *Id.* at § 222 (to be codified at 5 U.S.C. § 657(c)(1))

¹²⁷ *Id.*

¹²⁸ *Id.* at § 657(c)(2)(B).

¹²⁹ *Id.* at § 203

munications Commission) to prepare a flexible enforcement policy.¹³⁰

C. The Legislative Veto

Congress provided a further backstop against undue regulation by authorizing legislative veto of regulations promulgated after March 29, 1996.¹³¹ While the detailed operation of the legislative veto process is beyond the scope of this article, a brief discussion of the important elements as they relate to regulatory relief for small businesses is useful.

For every regulation issued by the government, the federal agency is required to submit a report to the House of Representatives and Senate providing a concise statement of the proposed rule, its purposes, any cost-benefit analysis of the rule, any material developed in response to executive orders, and the agency's actions relative to compliance with the RFA, including but not limited to the expanded efforts at outreach.¹³² Congress can then, by enacting a joint resolution, prevent the regulation from taking effect unless the President vetoes the resolution within thirty days of its passage.¹³³ It is important to note, however, that regulations implementing the Telecommunications Act of 1996 are specifically excluded from legislative veto.¹³⁴

VI. CHANGES IN PRACTICE BEFORE THE COMMISSION

SBREFA provides a number of opportunities for improving the regulatory climate for small businesses at the Commission. However, this requires attorneys and trade associations represent-

ing small business interests to pay close attention to the Commission decisionmaking processes.

Obviously, the most significant change to SBREFA is the ability to challenge the Commission's compliance with the RFA.¹³⁵ Such challenges will have to be brought within the statutory time limit set for challenges to Commission orders since such a time limit is less than one year.¹³⁶

In the future, small businesses that disagree with Commission rulemaking outcomes will have a new ground upon which to convince a federal appeals court that the Commission's rulemaking should be revisited.¹³⁷ Rather than having to attack the validity of the rule, and overcome the deference shown to federal agency interpretations of their statutory mandate,¹³⁸ small businesses are able to attack the agency's procedures (non-compliance with the RFA) for promulgating the rule in question.¹³⁹ Courts show far less deference to an agency's failure to follow procedure than they do in adjudicating the actual substance of a rule.¹⁴⁰ Therefore, a challenge to an agency regulation based upon the failure to comply with the RFA has a greater chance of success than challenging the rationality of the rule.

However, simply bringing a lawsuit challenging agency compliance is probably insufficient. Section 405(a) of the Communications Act of 1934 requires that the Commission first be given the opportunity to review factual or legal arguments before access to the courts is possible.¹⁴¹ This 'exhaustion requirement' applies with equal weight to procedural matters such as compliance with the APA.¹⁴²

The reasoning of the exhaustion requirement applies with equal force to challenges to the

¹³⁰ *Id.* Agencies regulating small businesses under SBREFA are required to "provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for the violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities." *Id.*

¹³¹ *Id.* at §§ 801, 808 (1996).

¹³² *Id.* at § 801(a)(1)(B).

¹³³ *Id.* at § 801(a)(3)(B).

¹³⁴ *Id.* at § 252 (to be codified at 5 U.S.C. § 804(2)).

¹³⁵ *Id.* at § 202.

¹³⁶ Challenges to Commission orders are governed by the Administrative Orders Review Act, 28 U.S.C. §§ 2341 (1994). That act requires appeals to be filed in court within 60 days. *Id.* at § 2344.

¹³⁷ *Id.*

¹³⁸ *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 845, 865 (1984).

¹³⁹ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 242, 110 Stat. 857 (to be codified at 5 U.S.C. § 611(a)(3)(A)).

¹⁴⁰ See *Southwestern Bell Tel. Co. v. FCC*, 10 F.3d 892, 896 (D.C. Cir. 1993); *Reeder v. FCC*, 865 F.2d 1298, 1304 (D.C. Cir. 1989); *Buschman v. Schweiker*, 676 F.2d 352, 355 (9th Cir. 1982).

¹⁴¹ 47 U.S.C. § 405(a) (1994); see, e.g., *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1021 (2d Cir. 1986); *State Corp. Comm. v. FCC*, 787 F.2d 1421, 1427 n.4 (10th Cir. 1986); *Rogers Radio Comm'n. Serv., Inc. v. FCC*, 593 F.2d 1225, 1229 (D.C. Cir. 1978).

¹⁴² *Action for Children's Television v. FCC*, 906 F.2d 752, 755 (D.C. Cir. 1990).

RFA.¹⁴³ If the primary objective of the exhaustion requirement is to enable the Commission to correct potential problems, then clearly courts will require that an inadequate initial analysis or improper certification be addressed to the Commission through comments so the Commission can attempt to correct the mistake.¹⁴⁴ This is particularly appropriate so that the Commission can adopt rational rules without, having constant intervention from the courts. Therefore, it will be necessary that small businesses and trade associations file comments, according to Commission procedure, on any regulatory flexibility analysis (under separate cover) or certification (as part of the comments) in order to preserve that as an issue on appeal.¹⁴⁵

Preparation and filing of comments on Commission rulemakings is important for reasons other than preserving issues for appeal. Proposed regulations may have differential impacts on different categories of small businesses. Even if the Commission prepared exemplary regulatory flexibility analyses, the Commission cannot possibly ascertain all of the various problems and interests that each and every small business may have regarding a given regulation. The process of notice and comment exists to educate the agency.¹⁴⁶ If small businesses want the Commission to write "small-business friendly" regulations, they must participate and educate the agency.

Challenges to the Commission's compliance with the RFA is not the only option available to small businesses seeking to obtain relief under SBREFA.¹⁴⁷ Agency compliance guides will be extremely valuable to small businesses, particularly as the Commission continues efforts to reallocate various sections of the spectrum, while it also continues to find and promote new technologies. Small businesses, as well as trade associations, must be vigilant in ensuring that the Commission

not only properly identifies significant rules but publishes easily understandable guides.¹⁴⁸ To assist in its efforts to carry out this goal, the Commission, for example, should prepare a guide for complying with the new local competition rules, so that small competitive access providers, cable operators, and interexchange carriers will be able to more easily understand how to enter the local exchange business.

Finally, for new rules, such as those related to auctions, small businesses and trade associations should consider the potential of seeking a legislative veto. This is particularly appropriate in this context since the Commission views auctions as a statutory mandate under most circumstances. However, Congress can derail this¹⁴⁹ by passing a joint resolution.¹⁵⁰ If the small businesses can also convince the White House not to veto that resolution, they can defeat inappropriate auction rules.¹⁵¹ While this strategy may be particularly appropriate in auction proceedings, it may be an appropriate strategy in other Commission rulemakings¹⁵² which are not instituted to implement the Telecommunications Act of 1996.¹⁵³

VII. CONCLUSION

In 1980, Congress enacted the RFA with the hope and expectation that agencies would give due consideration to the impact of their regulations on small businesses.¹⁵⁴ Fifteen years of experience have demonstrated that most agencies, including the Federal Communications Commission, did not meet the intended goals of the RFA's authors. In an effort to improve this poor record, Congress enacted SBREFA which gives small businesses and their representatives new 'tools' to ensure that federal agencies consider the concerns of small businesses in their rulemaking and enforcement activities.¹⁵⁵ Vigilance by small busi-

¹⁴³ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, ' 242, 110 Stat. 857 (to be codified at 5 U.S.C. § 611(a)(3)(A))

¹⁴⁴ *American Radio Relay League v. FCC*, 617 F.2d 875, 879 n.8 (D.C. Cir. 1980).

¹⁴⁵ *Id.*

¹⁴⁶ *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1985).

¹⁴⁷ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, ' 244, 110 Stat. 857 (to be codified at 5 U.S.C. § 609)

¹⁴⁸ The ability to challenge the Commission's certification then becomes an important tool in ensuring that the compliance guides are adopted for all significant rules — not

just those that the Commission believes are important.

¹⁴⁹ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, ' 801, 110 Stat. 857 (to be codified at 5 U.S.C. § 802).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Again, it is important to create a good record concerning Commission compliance with the RFA since that analysis is delivered to Congress.

¹⁵³ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, ' 202, 110 Stat. 857 (to be codified at 5 U.S.C. § 601 note.)

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

nesses in Commission decisionmaking will go towards ensuring that the proper record is created for challenges to rulemakings, either in court or in Congress. Hopefully, the Commission will not have to be hauled into court or Congress. Litigation over these various issues should be avoidable

if the Commission follows the letter and spirit of the RFA and SBREFA, which, at the same time, will allow the Commission opportunities to craft new rules that will reduce burdens on small businesses.